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No. 2148 (3)

Office-Supreme Court, U.S.
FILED
NOV 23 1984
ALEXANDER L. STEVAS,
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# In the Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF OREGON, DEPARTMENT OF FISH AND WILDLIFE, et al.,

Petitioners,

v.

KLAMATH INDIAN TRIBE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## BRIEF FOR PETITIONERS

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## QUESTION PRESENTED

May a state regulate fishing, hunting and trapping on former Indian reservation lands ceded by an Indian tribe to the federal government under the following circumstances:

(1) a treaty had reserved to the Tribe the rights to fish, hunt and trap exclusive of state regulation on lands "included in the reservation;"

(2) the subsequent cession act provided that the tribal members "do hereby cede, surrender, grant and convey to the United States all their claim, right, title and interest in and to" the ceded lands; and

(3) neither the cession act, its legislative history, nor the surrounding circumstances clearly indicated that Congress intended to restore to the tribal members their exclusive right to fish, hunt and trap on the ceded lands?

## PARTIES

The parties to the proceeding in the Ninth Circuit Court of Appeals whose judgment is sought to be reviewed are as follows: Klamath Indian Tribe (respondent herein); The Oregon Department of Fish and Wildlife; John Donaldson, individually and as Director of Oregon Department of Fish and Wildlife; The Oregon Fish and Wildlife Commission; Don Barth, John Boyer, Kenneth Klarquist, R. Gene Morris, Herbert Lundy, Fred A. Phillips, II, Jack Steiwer, each individually and as a member of the Oregon Fish and Wildlife Commission; John C. Williams, individually and as Superintendent of the Oregon State Police; Major Sterling Norton, individually and as Head of Fish and Game Division of the Oregon State Police, (petitioners herein).



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# BRIEF FOR PETITIONERS

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## OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported as *Klamath Indian Tribe v. The Oregon Department of Fish and Wildlife*, 729 F.2d 609 (9th Cir. 1984). (P.C., App. A).[1] The opinion of the United States District Court was not reported. (P.C., App. B).

## JURISDICTION

The Ninth Circuit's opinion was dated and filed on March 27, 1984. The judgment sought to be reviewed was entered on the same date. Jurisdiction to review the court of appeals' judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1). The petition for writ of certiorari timely was filed on June 25, 1984, and allowed by this Court on October 9, 1984.

## STATUTES AND TREATIES INVOLVED

This case involves two acts of Congress. The first is the Treaty of October 14, 1864, 16 Stat. 707 (1866), in which the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians ceded to the United States approximately 20 million acres of aboriginal lands and reserved an area comprising approximately 1.9 million acres. (P.C., App. C). The second is the Act of June 21, 1906, 34 Stat. 366, in which Congress ratified an agreement with the Klamath and other Indians that provided for the Tribe's cession of 621,824 acres

[1] As used in this brief, the abbreviation "P.C., App." refers to the appendix to the petition for writ of certiorari.

of former reservation land to the United States in exchange for $533,270. (P.C., App. D).

## STATEMENT OF THE CASE

By the Treaty of October 4, 1864, the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians ceded "all their right, title and claim" in approximately 20 million acres of aboriginal lands in exchange for a reservation of approximately 1.9 million acres. This land "until otherwise directed by the President of the United States," was to "be set apart as a residence for said Indians, [and] held and regarded as an Indian reservation." 16 Stat. 707, (P.C., App. C).

Pursuant to the terms of the treaty, the Klamath Tribe members agreed and bound

> themselves that, immediately after the ratification of this treaty, they will remove to said reservation and remain thereon, unless temporary leave of absence be granted to them by the superintendent or agent having charge of the tribes.

*Id.* The treaty further provided that no white persons were to remain on the reservation and that the Indians would have the exclusive rights to occupy the reservation and to fish in the waters included in the reservation:

> It is further stipulated and agreed that no white person shall be permitted to locate or remain upon the reservation, except the Indian superintendent and agent, employes of the Indian department, and officers of the Army of the United States, and that in case persons other than those specified are found upon the reservation, they shall be immediately expelled therefrom; *and the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits, is hereby secured to the Indians aforesaid . . . .*



*Id.* (emphasis added).

In 1871, the United States government surveyed the reservation's exterior boundaries. (J.A. 11). The survey erroneously excluded a large amount of land from the reservation boundaries because the natural boundaries referred to in the 1864 Treaty were not followed where they did not conform to township subdivision surveys. *Id.* In the years following 1871, tribal members complained because they believed land erroneously had been excluded from the reservation. (J.A. 11).

Congress responded to the tribal complaints in 1896 by authorizing the appointment of the Klamath Boundary Commission to determine the number of acres excluded from the reservation and the value thereof. *Id.* The commission interviewed tribal members who had been signatories to the 1864 Treaty. Many of these members testified they were convinced the excluded land was intended to be within the reservation boundaries because they had informed the Indian agent who negotiated the treaty that they wanted the land because of its fishing, hunting and gathering value. (Stip., Ex. D).[2] The commission's report was transmitted to the 54th Congress by the Secretary of the Interior, who noted in his transmittal letter:

> the Commissioners find the area of lands which have been excluded from the reservation by the erroneous surveys of its outboundaries to be 617,490 acres, and

[2] Various exhibits from the Stipulation of the Parties filed in the district court were not reproduced in the Petition for Certiorari or in the Joint Appendix. A list of exhibits appears on page 20 of the Joint Appendix.

determine the value of these excluded lands to be $533,270.

> The report in question has been carefully examined by the Commissioner of Indian Affairs, as shown by the accompanying communication dated 25th instant, who states that in his opinion a portion of the funds due the Indians should be made available for irrigation purposes for the benefit of the Indian allottees and the schools, . . . and the remainder of the sum recommended by the Commission to be paid . . . be expended under the direction of the Secretary of the Interior in the drainage and irrigation of lands, and in the purchase of cattle, wagons, mowing machines, and agricultural implements, the erection of houses, and for such other purposes as he may deem for the benefit of the Indians.
>
> The Commissioner submits an item for insertion in the Indian appropriation bill now pending, prepared in accordance with the above recommendations, and I have the honor to recommend that the matter receive early and favorable consideration by the Congress.

*Id.* The Boundary Commission Report mentioned that the character of the excluded area varied greatly, and that

> [w]ith the exception of the meadows of the Sycan and Sprague River sections, which are the principal bone of contention, the greater part of the excluded land consists of rocky and sterile mountain ranges, producing very ordinary timber and little grass.
>
> . . . .
>
> Giving these inferior tracts, the good timber land and the meadows of the Sycan and Sprague River valleys their proportionate valuation, we determine the value of the excluded land to be $533,270, or 617,490 acres at 86.36 cents per acre.

*Id.*

Following lengthy negotiations with the Klamath Indians, and after subsequent surveys revealed that 621,824 acres mistakenly had been excluded from their reservation, the



United States entered into a cession agreement with the Tribe on June 17, 1901, with respect to the erroneously excluded lands. (J.A. 12-13). This agreement was ratified by Congress in 1906. (J.A. 13).

Article I of the Act of 1906 provided that the Klamath Indians

> *do hereby cede, surrender, grant and convey to the United States all their claim, right, title, and interest in and to all that part of the Klamath Indian Reservation* lying between the boundaries described in the [1864] treaty . . . and the reservation boundary lines as established by the survey approved in eighteen hundred and eighty-eight by the General Land Office, the tract of land hereby ceded and relinquished comprising six hundred and twenty-one thousand eight hundred and twenty-four acres.

34 Stat. 366, (P.C., App. D; emphasis added).

Article II provided for the payment to the Klamath Indians of $537,007.20:

> In consideration of the land ceded, relinquished, and conveyed by Article I of this agreement, and in full [sic] of all claims and demands of said Klamath and other Indians arising or growing out of the erroneous survey of the outboundaries of their reservation in eighteen hundred and seventy-one . . . .

*Id.*

Article III specified the manner of payment to the Indians of the $537,007.20. Article IV provided:

> It is understood that nothing in this agreement shall be construed to deprive the said Klamath and other Indians of the Klamath Agency of any benefits to which they are entitled under existing treaties, not inconsistent with the provisions of this agreement.

*Id.*

Virtually all of the land ceded by the Klamath Tribe was closed to entry and placed in either national forests or parks. (J.A. 13-14). Since passage of the Act of 1906, tribal members have continued to fish, hunt and trap on the excluded lands without regard for state laws or regulations. (J.A. 14). The parties below agreed that although the State of Oregon generally asserted its jurisdiction over tribal members when they were fishing, hunting and trapping outside the reservation boundaries, the parties were unaware of any assertion by the state or denial by the Tribe of state jurisdiction over Indian fishing and hunting specifically with regard to the lands ceded in the 1906 Act. (J.A. 15).

On March 16, 1982, plaintiff Klamath Indian Tribe filed an action in the District Court for the District of Oregon, pursuant to 28 U.S.C. § 1331, to enjoin defendants State of Oregon Department of Fish and Wildlife, et al (hereinafter "State of Oregon" or "state") from interfering with tribal members' fishing, hunting and trapping of wildlife on certain lands, and for declaration of their rights with respect thereto. (J.A. 2-8). At issue, specifically, was the State of Oregon's authority to extend its fish and game laws to two areas of land: (1) lands outside the exterior boundaries of the Klamath Indian reservation as those boundaries existed at the time of termination of the Tribe in 1954, which lands had been ceded by the Tribe in 1906 to the United States (the ceded lands); and (2) lands within the boundaries of the reservation at the time of the 1954 termination, refered to as "C & O



lands." The defendants conceded they had no authority to exert state jurisdiction over the C & O lands.

On cross-motions for summary judgment, the district court granted judgment in favor of plaintiff Tribe and, declared that the Act of June 21, 1906, 34 Stat. 366, did not abrogate the treaty rights of the Klamath Indian Tribe to fish, hunt, and trap free from state regulation on lands ceded to the federal government under the 1906 Act. (J.A. 23). The State of Oregon appealed the district court's judgment to the Ninth Circuit Court of Appeals, pursuant to 28 U.S.C. § 1291.

The Ninth Circuit affirmed the judgment of the district court. The court of appeals reasoned:

(1) The ceded lands originally were intended to be included in the Treaty of 1864 but were excluded by an erroneous survey that did not diminish the reservation's boundaries.

(2) The treaty rights to fish, hunt and trap were "not appurtenant to the Tribe's property interest in the former reservation land itself" but existed "apart from ownership of the land." 729 F.2d at 612.

(3) Under a provision of the 1906 Act securing to the Indians "all benefits under existing treaties not inconsistent with the Act," the treaty-reserved rights to fish, hunt and trap survived because they were not inconsistent with the 1906 Act.

(4) Because the treaty-reserved rights to fish, hunt and trap were not inconsistent with the cession agreement, "the

Tribe's treaty rights may be abrogated only by a showing of clear congressional intent." 729 F.2d at 612.

(5) The face of the 1906 Act, the surrounding circumstances and the legislative history show no clear congressional intent to abrogate the treaty-reserved rights to fish, hunt and trap on lands included in the reservation.

With respect to this last point the Ninth Circuit emphasized that the 1906 Act did not mention fishing, hunting and trapping rights. The court concluded that the Indians were not compensated for loss of fishing, hunting and trapping rights in the Cession Agreement and characterized this factor as evidence of congressional intent not to abrogate those rights. *Id.*

The State of Oregon petitioned this Court for a writ of certiorari on the asserted grounds that the Ninth Circuit Court of Appeals failed to appreciate and assess the legal significance of the 1906 Cession Agreement and that its decision conflicts with an opinion of the Eighth Circuit Court of Appeals in *Red Lake Band of Chippewa Indians v. State of Minnesota*, 614 F.2d 1161 (1980) (*per curiam*), *cert. denied*, 449 U.S. 905 (1980). This Court granted the state's petition.

## SUMMARY OF ARGUMENT

This case presents a significant issue of Indian treaty and cession agreement law. The Ninth Circuit Court of Appeals erroneously held that the Klamath Indian Tribe retained rights to fish, hunt, and trap — exclusive of state regulation — on former reserved lands that subsequently were ceded to the federal government when 1864 reservation boundaries were



redrawn in 1906. Reversal is required because the court of appeals failed to apply the correct principle of law: When an Indian tribe cedes reservation land, thus diminishing reservation boundaries, the tribe's treaty rights exclusively to fish, hunt and trap correspondingly are diminished, unless the original treaty or the subsequent cession act manifest congressional intent that the tribe exercise those exclusive rights off the reservation.

The 1906 Cession Act undoubtedly diminished the boundaries of the 1864 reservation. The plain language of the 1906 Act,

> "The said Klamath . . . do hereby cede, surrender, grant and convey to the United States all their claim, right, title and interest in and to all that part of the Klamath Indian Reservation lying between the boundaries described in the [1864] treaty . . . and the reservation boundaries as established by the [1888] survey. . ."

precisely was suited to effect a diminishment of the Klamath Indian Reservation. The Ninth Circuit's refusal to acknowledge the patent effect of these terms stands in stark contravention of pertinent decisions of this Court such as *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) and *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

Diminishment of the boundaries of the Klamath Reservation resulted in abrogation of exclusive fishing, hunting and trapping rights on the land removed from the reservation. Because the Ninth Circuit did not factor the boundary diminishment into its analysis, it did not consider the effect diminishment necessarily had on Indian treaty rights

exclusively to fish, hunt and trap. Courts, including this Court, that apparently or actually have considered this question have concluded that diminishment or disestablishment of reservation boundaries does abrogate treaty reserved fishing, hunting and trapping rights. *See Mattz v. Arnett*, 412 U.S. 481 (1973); *Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir.) *cert. denied*, 449 U.S. 905 (1980); *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809 (8th Cir. 1983); *State v. Hero*, 282 N.W.2d 70 (S.D. 1979).

This particular effect of reservation diminishment clearly is apparent in the present case. The 1864 Treaty reserved to the Klamath no off-reservation wildlife gathering rights, but rather limited exercise of those rights to the reservation. The purpose and effect of the 1906 Cession Act was to reduce the area of the reservation. The combination of these two factors logically leads to the conclusion that when the reservation was diminished, the area within which the Klamath could exercise exclusive fishing, hunting and trapping rights also was circumscribed. The plain language of the 1906 Cession Act mandates this conclusion. Just as this language was "precisely suited" to diminish the reservation, the terms were also particularly appropriate to extinguish the Tribe's exclusive fishing, hunting and trapping rights in the ceded lands.

Moreover, neither the terms of the 1906 Cession Act, its legislative history, nor the circumstances surrounding its enactment manifest a congressional intent to restore exclusive Indian fishing and hunting rights on the lands removed from the reservation. The clear portent of the oper-



ative cession language was not — as the Ninth Circuit mistakenly concluded — overridden by other savings clause language which merely reaffirmed the Indians' exercise of rights on the reservation, however described. The savings clause on which the court of appeals misplaced much reliance was not construed so expansively by this Court in *Rosebud Sioux Tribe v. Kneip, supra.*

The Ninth Circuit's reading of the 1906 Cession Act also lacks support in the pertinent legislative history. The Act, as the treaty it modified, was adopted in an era when national Indian policy favored the Indian's pursuit of agriculture, an interest at odds with a finding of implicit congressional intent to grant expansive Indian fishing and hunting rights. Furthermore, an intent to restore or reserve exclusive Indian fishing and hunting rights cannot be extrapolated from the lack of a reference to those rights in the Cession Act and from the fact that the principal value of the ceded land was its wildlife resource potential. In light of the then contemporary national policy, the most reasonable inference to be drawn is that the sum of money Congress paid in consideration for the cession of lands was intended to include compensation for abrogated fishing and hunting rights.

Finally, where the evidence of the parties' subsequent constructions of the 1906 Cession Act neither supports nor undermines a finding of congressional intent to restore exclusive wildlife gathering rights on the land removed from the reservation, the Act's terms of diminishment should be accorded due respect. As this Court has recognized, "Indian

treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties. *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943).

The court of appeals rewrote the clear terms of the treaty and cession agreement in this case. Its decision should be reversed, and the state's right to regulate fishing and hunting on the ceded lands should be recognized.

## ARGUMENT

### I. The court of appeals failed to apply the proper principle of Indian treaty law in concluding that the Klamath had exclusive authority to regulate fishing, hunting and trapping on lands ceded to the federal government.

The narrow issue presented by this case is whether the State of Oregon or the Klamath Indian Tribe has the power to regulate fishing, hunting and trapping on lands formerly included in the Klamath Indian Reservation established by an 1864 treaty, but subsequently ceded to the federal government in a 1901 Cession Agreement and 1906 Act. In holding that the state lacked the authority to regulate Klamath fishing, hunting and trapping on the ceded lands, the Ninth Circuit Court of Appeals did not apply the correct legal principle. That principle is straightforward. When an Indian tribe unequivocally cedes reservation land and thus diminishes reservation boundaries, its treaty rights to fish, hunt and trap exclusive of state regulation correspondingly are diminished, unless the treaty that established the reservation reserved such rights outside the reservation boundaries or Congress, at



the time of the subsequent cession agreement, clearly manifested its intent to grant those rights on the ceded lands to the Indians.

The court of appeals did not apply even a semblance of this rule in resolving the issue presented in this case. The lower court essentially held that loss of occupancy rights to the ceded land did not abrogate the Klamath Indian Tribe members' fishing, hunting and trapping rights because those rights were not tied to their occupancy of the ceded land.[3] The court then reasoned that because Congress had not clearly

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[3]The Ninth Circuit's assertion that the Tribe's usufructuary rights were not tied to the Tribe's possessory interest in the reserved lands conflicts with the 1864 Treaty and the Ninth Circuit's prior opinions in *Kimball v. Callahan* (*Kimball I*), 493 F.2d 564 (9th Cir.), *cert. denied*, 419 U.S. 619 (1974) and *Kimball v. Callahan* (*Kimball II*), 590 F.2d 768 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979). In *Kimball I*, the Ninth Circuit interpreted the 1864 Treaty as not limiting the Tribe's wildlife gathering rights to the treaty-reserved right to fish on reservation lands. The court properly relied on this Court's analysis in *Menominee Tribe v. United States*, 391 U.S. 404 (1968) to hold that the Indians' possessory right to occupy the reservation as a residence included the right to fish, hunt, trap and gather on the reservation. The Court stated:

> In Menominee Tribe v. United States, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968), the Supreme Court considered the Treaty of Wolf River of 1854, 10 Stat. 1064, which granted the Menominee Indians a reservation in Wisconsin. *The treaty made no mention of hunting and fishing rights, but provided that the reservation was to be held by the Indians "for a home, to be held as Indian lands are held." The Court agreed with the Court of Claims that this language includes the right to hunt and fish.*391 U.S. at 406, 88 S.Ct. 1705; Menominee Tribe v. United States, 388 F.2d 998, 1002, 179 Ct.Cl. 496, 503-504 (1967); State v. Sanapaw, 21 Wis.2d 377, 383, 124 N.W.2d 41, 44 (1963).
>
> *We find that the language "set apart as a residence for said Indians, [and] held and regarded as an Indian reservation" also includes those rights.* The specific treaty provision reserving the Klamaths' exclusive right to fish could prompt the argument that their treaty excludes the right to hunt. However, in light of the highly significant role that hunting and trapping played (and continue to play) in the lives of the Klamaths, it seems unlikely that they would have knowingly relinquished these rights at the time they entered into the treaty. *See* Menominee Tribe v. United States, 391 U.S. at 406, 88 S.Ct. 1705. . . .

*(Footnote continued on next page)*

manifested an intent to abrogate those rights on the face of the 1906 Cession Act, in the surrounding circumstances or the legislative history, those rights were not extinguished on the ceded lands.

The fundamental flaw of the Ninth Circuit's analysis is that it does not take into consideration the significant, undisputed facts that the 1864 Treaty reserved to the Tribe rights to fish, hunt and trap only as to lands within the reservation and the 1906 Act removed the ceded land from the reservation. The Treaty right to fish, hunt and trap, being a right limited to lands within the reservation, continued after 1906 only on the reservation as diminished. Congress did not manifest its intent in adopting the 1906 Cession Act that the Klamath's on-reservation fishing, hunting and trapping rights be continued off the reservation on the ceded land. Moreover, the 1906 Cession Act, with its language "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest" in the ceded lands, was "precisely suited"

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*(Footnote continued from previous page)*

they entered into the treaty. *See* Menominee Tribe v. United States, 391 U.S. at 406, 88 S.Ct. 1705. . . .

493 F.2d at 565, (emphasis added; footnotes omitted).

The 1954 Klamath Termination Act severed the link between the Tribe's usufructuary rights and its right to possess reservation land as a home with respect to lands withdrawn from the reservation pursuant to the Termination Act. In *Kimball II*, the Ninth Circuit explained that the reason that the Tribe did not lose its right to fish, hunt and trap on land withdrawn through the Act was due to the Act's express provision that the Tribe retained the right to fish, hunt and trap on those lands. 590 F.2d at 772.

In declaring, in this case, that the Tribe's right to garner wildlife from the reservation land was separate and unrelated to its right to possess the reservation as a home, the Ninth Circuit wrongly and without acknowledgment, explanation or authority repudiated its rulings in *Kimball I* and *Kimball II* and this Court's analysis in *Menominee Tribe v. United States*.



to include relinquishment of all treaty rights of the Klamath, including fishing, hunting and trapping. The Ninth Circuit overlooked the logical meaning of this language in concluding that Congress did not manifest an intent on the face of the 1906 Act to abrogate treaty fishing, hunting and trapping rights on the land ceded to the federal government.

Application of the proper principle for resolution of this case, therefore, compels the conclusion that the 1906 Cession Act abrogated the Klamath's treaty rights exclusively to fish, hunt and trap on the ceded lands, and requires reversal of the Ninth Circuit's decision below.

## II. The 1906 Cession Act abrogated the Klamath's treaty rights exclusively to fish, hunt and trap on the ceded land because the Act diminished the 1864 reservation boundaries, the 1864 Treaty limited exercise of those treaty rights to the reservation, and Congress did not manifest an intent in adopting the Cession Act that the Klamath be allowed to exercise their exclusive treaty rights on the ceded land.

### A. The 1906 Cession Act unquestionably diminished the boundaries of the Klamath Indian Reservation.

In reaching the erroneous conclusion that the State of Oregon lacked jurisdiction to regulate fishing, hunting and trapping on the ceded lands, the lower courts ultimately failed to attach due legal significance to the effect of the 1906

Cession Act. Neither the district court nor the court of appeals fully acknowledged that the 1906 Cession Act diminished the boundaries of the reservation established by the 1864 Treaty. Given the language of the 1906 Cession Act, this Court's construction of almost identical operative language in other acts, and the Klamath's concessions below, the lower courts should have recognized that the 1906 Cession Act diminished the Klamath Indian Reservation boundaries.

Respondent Tribe conceded below that the 1906 Act diminished the boundaries, at least "for most purposes," (Resp. Br. below at 20, n. 6). In its brief to the court of appeals and in its response to the petition for certiorari, the Tribe noted that this case had proceeded from the beginning under the assumption that diminishment had occurred. (Resp. Br. below at 25, n. 9; Response to Cert. Pet. at 7, n. 5). But even if these statements are somewhat equivocal, the conclusion that the 1906 Cession Act diminished the boundaries of the Klamath Reservation is mandated by this Court's construction of similar operative language.

In *DeCoteau v. District County Court*, 420 U.S. 425 (1975), the Court held that the employment of language, the "Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation," was "precisely suited" to the purpose of terminating the Lake Traverse Reservation. 420 U.S. at 445. In *DeCoteau*, this Court concluded that an act of Congress providing for the sale of Indian unallotted lands within the reservation, which



comprised 85 percent of the total land area within the reservation, had the effect of terminating the entire reservation such that the ceded, unallotted lands were no longer "Indian country" as defined in 18 U.S.C. § 1151. As a result, South Dakota had regulatory jurisdiction over the unallotted lands. The Court noted that the language employed in the cession acts

> is virtually indistinguishable from that used in the other sum-certain, cession agreements ratified by Congress in the same 1891 Act. See nn 21 and 22, supra. That the lands ceded in the other agreements were returned to the public domain, stripped of reservation status, can hardly be questioned, and every party here acknowledges as much.

420 U.S. at 446.[4]

This Court distinguished the facts in *DeCoteau* from those in the prior cases of *Mattz v. Arnett*, 412 U.S. 481 (1973) and *Seymour v. Superintendent*, 368 U.S. 351 (1962). Unlike *Mattz* and *Seymour*, *DeCoteau* involved a voluntary cession by the Tribe of unallotted lands and vested in the Tribe a "sum certain . . . in payment for the express cession and relinquishment of 'all' of the tribe's 'claim, right, title and interest' in the unalloted lands." 420 U.S. at 448.

In *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), this Court concluded that acts of Congress passed in 1904, 1907

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[4] The language from the other cession agreements ratified by Congress in the same 1891 Act, referred to by this Court in *DeCoteau*, included the terms "cede, convey, transfer, relinquish, and surrender forever and absolutely . . . all their claim, title, and interest of every kind and character"; "cede, grant, relinquish and quitclaim to the United States all right, title, and claim which they now have, or ever had . . ."; "cede, sell, and relinquish . . . all their right, title, and interest . . . ." 420 U.S. at 439, footnotes 21 and 22.

and 1910 diminished the boundaries of the Rosebud Sioux Reservation established by treaty in 1889. The three acts disposed of all unalloted lands in fou of the five counties which encompassed the reservation. The acts in question were preceded by a 1901 agreement with respect to the unallotted lands in Gregory County. This agreement with the Rosebud was negotiated by Inspector James McLaughlin, who negotiated many agreements during this period, including the 1901 Cession Agreement with the Klamath involved in the present case. The Rosebud agreement provided that subject to congressional ratification the Rosebud, for a sum-certain consideration,

> hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota.

430 U.S. at 591, n. 8.

The 1901 agreement was not ratified by Congress because Congress did not desire to bind itself to a sum-certain payment, preferring instead to pay the Rosebud as the unallotted lands were sold. This Court nevertheless relied upon the unratified agreement as indicative of congressional intent that the 1904 Act disestablish or diminish the Rosebud Reservation:

> What is important for our purposes is the undisputed fact that the 1901 Agreement, had it been ratified by Congress, would have disestablished that portion of the Rosebud Reservation which lay in Gregory County . . . [T]he effect and intent of the 1901 Agreement, if ratified, would have been to change



> the Reservation boundaries. As we noted in DeCoteau v District County Court, 420 US at 445 . . . in construing virtually identical language: "The Agreement's language . . . was precisely suited to this purpose [of disestablishment]". In this Agreement, therefore, we have — unlike in Mattz v Arnett, 412 US 481 . . . — an unmistakable baseline purpose of disestablishment.

430 U.S. at 591-92.

This Court then examined the legislative process which resulted in the 1904, 1907 and 1910 Acts, and concluded that the intent of the unratified 1901 agreement was carried out. In fact, the 1904 Act incorporated verbatim the cession language of the 1901 agreement. Referring to the language used in the 1904 Act, this Court again stated that "this language 'is precisely suited' to disestablishment." 430 U.S. at 597.

The importance of the cession language that appeared in *DeCoteau* and *Rosebud* recently was reaffirmed by this Court in *Solem v. Bartlett*, ___ U.S. ___, 104 S.Ct. 1161 (1984). The Court noted that "[o]ur precedents in the area have established a fairly clean analytical structure for distinguishing those surplus land acts that diminished reservations from those acts that simply offered non-Indians the opportunity to purchase land within established reservation boundaries." *Id.* at 1166. As this Court explained:

> Diminishment, moreover, will not be lightly inferred. Our analysis of surplus land acts requires that Congress clearly evince an "intent to change boundaries" before diminishment will be found. *Rosebud v. Kneip, supra*, 430 U.S., at 615. The most probative evidence of congressional intent is the statutory lan-

> guage used to open the Indian lands. Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands. *DeCoteau v. District County Court, supra*, 420 U.S., at 444-445; *Seymour v Superintentent, supra*, 368 U.S. at 355. When such language of cession is buttressed by an unconditional committment from Congress to compensate the Indian tribe for its opened land, there is an almost unsurmountable presumption that Congress meant for the tribe's reservation to be diminished. See *DeCoteau v. District County Court, supra* 420 U.S. at 447-448.

*Id.*, (parallel citations omitted).

In *Solem v. Bartlett*, this Court concluded that the Cheyenne River Act of May 29, 1908, which authorized the Secretary of the Interior to open 1.6 million acres of the Cheyenne River Sioux Reservation for homesteading, did not diminish the boundaries of the Cheyenne River Sioux Reservation. The Act did not employ language evidencing congressional intent to terminate the reservation, but simply permitted non-Indians to settle within existing reservation boundaries. This Court found that the language employed in the Cheyenne Act stood

> in sharp contrast to the explicit language of cession employed in the Lake Traverse and 1904 Rosebud Acts discussed in our opinions in *DeCoteau* and *Rosebud Sioux Tribe*.

104 S.Ct. at 1168.

The language of the 1906 Cession Act involved in the present case, "the said Klamath . . . do hereby cede, surrender, grant and convey . . . all their claim, right, title and interest in and to [the ceded land]," is virtually identical to the



language involved in *DeCoteau v. District County Court, supra*, and *Rosebud Sioux Tribe v. Kneip, supra*. That the 1906 Cession Act diminished the boundaries of the Klamath Reservation is even more clear in this case because a primary purpose of the Cession Act was to compensate the Klamath for lands excluded from the boundaries of the reservation as described in the 1864 Treaty.

### B. Diminishment of reservation boundaries results in relinquishment of on-reservation treaty rights in the land removed from the reservation, absent a manifestation of contrary congressional intent.

When disestablishment or diminishment of reservation boundaries has occurred, this Court has upheld state regulation of the area disestablished or removed from the reservation. *DeCoteau v. District County Court, supra*. Moreover, where this Court has not upheld state regulation of an area, it has reached this conclusion because the area had not been removed from the reservation boundaries. *Solem v. Bartlett, supra*; *Mattz v. Arnett, supra*; *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Seymour v. Superintentent, supra*.

This Court, however, has not squarely addressed the effect of diminishment of reservation boundaries on treaty rights to fish, hunt and trap on lands within the reservation. The Court implicitly addressed this issue in *Mattz v. Arnett, supra*. Mattz claimed that a California game warden's seizure of his gill nets under authority of a California statute was improper because the nets were being used to catch fish within

Indian country as defined in 18 U.S.C. § 1151. Mattz argued that California's statutes were inapplicable to him because 18 U.S.C. § 1162(b) prohibited California from enforcing its fish and game laws within Indian country. The court below had concluded that the area where the nets were seized was not Indian country, and that 18 U.S.C. § 1162(b), therefore, did not preclude California from enforcing its fish and game regulations. This Court stated that its

> decision in this case turns on the resolution of the narrow question whether the Klamath River Indian Reservation in northern California was terminated by Act of Congress or whether it remains "Indian country," within the meaning of 18 U.S.C. § 1151.

412 U.S. at 483. The court concluded that an 1892 Act of Congress which opened the reservation land for settlement had not terminated the reservation. The Court reversed the decision below and remanded for consideration by the lower court of Mattz' asserted fishing rights under the treaty establishing the Klamath River Indian Reservation.

Presumably this Court phrased the question in *Mattz* in the manner it did because if the land were no longer Indian country, Mattz would have been fully subject to California's jurisdiction, notwithstanding an asserted treaty right to fish on the land. Implicit, therefore, in this Court's decision is a holding that if the Klamath River Indian Reservation had been terminated, Mattz would have had no defense to California's assertion of jurisdiction to regulate his fishing on the former reservation regardless of his asserted treaty right to fish. This Court, therefore, must have assumed that Mattz' asserted treaty right to fish would have been extinguished if the reservation had been terminated.



In the present case, the Ninth Circuit not only failed to consider the implication of this Court's decision in *Mattz*, it also ignored the Eighth Circuit's resolution of the issue presented here: The effect of diminishment of reservation boundaries on treaty-reserved rights to fish, hunt and trap.

In *Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir.), *cert. denied*, 449 U.S. 905 (1980), the Eighth Circuit affirmed and adopted the district court's "well reasoned decision" (*United States v. Minnesota*, 466 F. Supp. 1382 (D. Minn. 1979)), that the Band gave up its rights to fish, hunt, trap and gather wild rice free of the state's regulation of such activities, on land which it had agreed to cede to the federal government. In an 1863 treaty, the Red Lake Band had ceded ten million acres to the federal government in exchange for a 3.2 million acre reservation. The treaty made no mention of fishing and hunting rights although the Indians had been promised by the Indian agent who had negotiated the treaty that they could continue to fish and hunt on the ceded land until it was settled. Subsequent to this treaty, two additional land cession agreements were negotiated with the Indians whereby they agreed to cede all but 543,000 acres to the federal government. Neither agreement made any mention of hunting and fishing rights on the ceded land. The district court held that by the terms of the agreements, which provided that the Band "agreed to 'grant, cede, relinquish, and

convey to the United States all our right, title, and interest in and to' " the ceded land, the Band had relinquished all rights to fish, hunt and trap on the ceded land. The district court aptly noted that the language used in the cession agreements was "nearly identical" to that contained in *Rosebud Sioux Tribe v. Kneip*, *supra*, and *DeCoteau v. District County Court*, *supra*, wherein the Supreme Court had "[made] clear that the . . . language was precisely suited for the purpose of eliminating Indian title and conveying to the government all the Band's interest in the ceded lands." *United States v. Minnesota*, 466 F. Supp. 1382, 1385 (D. Minn. 1979).
(D. Minn. 1979).

The district court's analysis, adopted by the Eighth Circuit, did not end with the determination that the language "grant, cede, relinquish and convey all our right, title, and interest in and to" the ceded land resulted in the Band's relinquishment of its fishing, hunting and trapping rights in the ceded area. The court further analyzed the cession agreements and the circumstances surrounding their execution to determine whether Congress had granted back to the Band fishing, hunting and trapping rights in exchange for the ceded land.

The court first examined early treaties and noted that they had two things in common:

> first, that the normal practice was to state in the agreement if the Band was reserving hunting and fishing rights in the ceded area, and second, that when those rights were reserved it was only for a limited duration, typically until the influx of white settlers occurred.



*Id.* at 1386. In its analysis of surrounding circumstances and legislative history, the court stated:

> The Band's position is refuted by numerous pieces of historical evidence. The legislative history of the 1889 Nelson Act makes no mention of reserved hunting and fishing right, but rather makes clear that the purpose of the Act is to restore the land to the public domain and open it to settlement by whites. *See generally*, H.R. Rep. No. 789, 50th Cong., 1st Sess. (1888) (Defendant's Exhibit F). Also, Congress had just recently enacted the Dawes Act in 1887, which established a policy of encouraging Indians to abandon their nomadic ways and adopt the agrarian lifestyle of whites. *See* Act of Feb. 8, 1887, c. 119, 24 Stat. 388. This suggests that Congress in 1889 probably would not have intended to allow the Red Lake Band to continue permanently its nomadic hunting and fishing habits over the lands ceded to the federal government.

*Id.* at 1387. The court concluded this portion of its analysis by stating that the "legislative history and the negotiations with the Band, if anything, [tend] to confirm that the enactments and agreements meant exactly what they said — the Band relinquished '*all* its right, title, and interest' to the areas ceded in 1889 and 1904." *Id.* at 1388 (emphasis in original).

Finally, the district court examined the subsequent construction given by the parties to the several enactments and agreements. The court noted on this point that the parties had conceded the federal and state governments' consistent position over the years that the members of the Band had no greater rights in the ceded area than did non-Indians, and that state gaming laws had regularly been enforced against Band members in the ceded areas.

The Ninth Circuit not only ignored *Red Lake Band*, it compounded this error by relying upon a later Eighth Circuit decision that in fact reaffirmed and distinguished its decision in *Red Lake Band*. In *Lower Brule Sioux Tribe v. State of South Dakota*, 711 F.2d 809 (8th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 707 (1984), the Court of Appeals for the Eighth Circuit explained the significance of the fact that its decision in *Red Lake Band* was premised on the finding of a diminishment of the Band's reservation. At issue in *Lower Brule* was whether certain congressional acts had abrogated the Tribe's treaty right exclusively to fish and hunt on reservation lands taken by the federal government to facilitate construction of two water projects. Unlike *Red Lake Band*, *Lower Brule* was not, as the Eighth Circuit recognized, a case involving diminishment of an Indian reservation:

> The district court's reliance on this Court's *Red Lake* decision was misplaced. In that case, we explicitly emphasized that our finding of abrogation of hunting and fishing rights was premised on the fact that the reservation had been diminished when the Chippewa voluntarily ceded the property in question to the United States. *Red Lake Band of Chippewa Indians v. Minnesota*, *supra*, 614 F.2d at 1162. *Red Lake* does not stand for the proposition that Congress necessarily abrogates treaty-reserved hunting and fishing rights when it uses statutory language taking an interest in certain reservation land. When, as here, the statutes in question have not disestablished reservation boundaries, general language referring to the "entire interest" or "all claims" in certain land falls short of stating a clear purpose to abrogate specific



> treaty rights. *United States v. White*, *supra*, 508 F.2d at 455-58.

711 F.2d at 822-23.

The *Lower Brule* court earlier had discussed *Menominee Tribe v. United States*, 391 U.S. 404 (1968) and the import of whether reservation boundaries had been disestablished:

> The first issue presented here is whether the Big Bend Act and/or the Fort Randall Act disestablished or diminished the boundaries of the Lower Brule Reservation. If no disestablishment occurred, the 1868 Fort Laramie Treaty would continue to preempt the application of state hunting and fishing laws on the reservation, and the Tribe would retain jurisdiction over tribal hunting and fishing on the land in controversy, except to the extent that the Tribe's rights have been abrogated by subsequent congressional action. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); *DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975). If either Act disestablished the reservation boundaries, the application of state law on the land taken by that Act no longer would be preempted, and South Dakota would have jurisdiction to regulate hunting and fishing by tribal members on that land absent federal law preserving the Indians' treaty hunting and fishing rights. *See id.*; *Menominee Tribe v. United States*, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968).

711 F.2d at 815 (footnote omitted). The Eighth Circuit concluded that no disestablishment of reservation boundaries had been effected and, therefore, no exclusive hunting and fishing rights had been abrogated, merely because a purpose of the congressional acts was to reimburse the Indians for the loss of the treaty right of exclusive occupancy of a portion of the reservation.

Because the *Lower Brule* case did not involve disestablishment or diminishment of reservation boundaries, the Eighth Circuit correctly examined the congressional acts to determine whether Congress manifested an intent to abrogate treaty rights. The Eighth Circuit correctly indicated that had the case involved a disestablishment of reservation boundaries, the court in light of its earlier *Red Lake Band* decision would have examined pertinent statutes and history to determine whether Congress had intended to grant back to the Tribe certain treaty rights abrogated as a result of disestablishment.[5]

The Ninth Circuit below did not address the Eighth Circuit's *Red Lake Band* decision. It did not explain why the analysis was faulty or why the present case was in any way distinguishable. The *Red Lake Band* principle that diminishment of reservation boundaries results in extinguishment of treaty rights on land removed from the reservation, absent

[5]The Ninth Circuit also erroneously relied on *Lac Court Oreilles Band v. Voigt*, 700 F.2d 341 (7th Cir.), *cert. denied* ___ U.S. ___, 104 S.Ct. 53 (1983), in concluding that the 1906 Cession Act had not extinguished the Klamath's exclusive fishing, hunting and trapping rights on the ceded lands. *Lac Court Oreilles Band*, however, like *Lower Brule*, did not involve the effect of disestablishment or diminishment of reservation boundaries on treaty-reserved rights to fish, hunt and trap. Furthermore, the treaty rights to fish, hunt and trap were rights which expressly had been reserved to the Band in cession agreements negotiated with the federal government. The agreements in *Lac Court Oreilles Band* are examples of the "normal practice" referred to by the district court in *United States v. Minnesota*, *supra*, to reserve fishing, hunting and trapping rights in cession agreements when the parties intended that those rights were to be retained on ceded lands. For other examples of cession agreements expressly reserving treaty rights in the ceded land, *see Antoine v. Washington*, 420 U.S. 194 (1975); *Swim v. Bergland*, 696 F.2d 712 (9th Cir. 1983).



manifestation of contrary congressional intent, is cogent.[6] Its application to the fact situation presented here is particularly appropriate.

First, the 1864 Treaty resulted in a cession by the Klamath and other tribes of "all their right, title and claim to all the country claimed by them" and the setting aside, within the land ceded, of a tract of land "as a residence for said Indians, [to be held] and regarded as an Indian reservation." 16 Stat. 707, (P.C., App. 17-18). The 1864 Treaty further provided that "the exclusive right of taking fish in the streams and lakes, *included in said reservation* . . . is hereby secured to the Indians aforesaid." *Id.* at 19. (Emphasis added). Because the Klamath and other Indian tribes involved in execution of the 1864 Treaty ceded to the federal government all their right, title and claim to their aboriginal lands to the United States, the only rights they retained in these lands were those that the 1864 Treaty reserved to them. The Treaty reserved to the Klamath the right to occupy as a residence a specified

[6] In *State v. Hero*, 282 N.W.2d 70 (S.D. 1979), the South Dakota Supreme Court concluded that diminishment of the Rosebud Sioux Reservation, as determined by this Court in *Rosebud Sioux Tribe v. Kneip*, *supra*, extinguished the tribe members' treaty-reserved hunting rights as to the land removed from the reservation.

> Because Congress was attempting to carry forth the objectives of the 1901 Agreement in the Acts of 1904, 1907 and 1910, one of these being cession of all the tribe's claim, title, and interest of every kind and character in the ceded land to the federal government, we believe the conclusion logically follows that the tribe retains no special hunting and fishing rights upon land that is no longer reservation, absent some clear intention by Congress to reserve those rights to the Indians. . . .

282 N.W.2d at 71.

tract of land, the right to exclude white persons from the reservation and the exclusive right to take fish "in the streams and lakes included in said reservation." The Treaty reserved to the Klamath no off-reservation fishing, hunting or trapping rights but instead limited the exercise of those rights to the reservation.[7] It follows logically that when the 1906 Cession Act reduced the size of the reservation it also had the effect of reducing the area within which the Klamath could fish, hunt and trap.

Second, the language used in the 1906 Cession Act is "precisely suited" to effecting a complete conveyance of all rights the Klamath had to the ceded area by virtue of its status as reservation land. The Act provided:

> ARTICLE I. The said Klamath and other Indians . . . do hereby cede, surrender, grant and convey to the United States all their claim, right, title, and interest in and to all that part of the Klamath Indian Reservation lying between the boundaries described in the treaty with said Indians concluded October fourteenth, eighteen hundred and sixty-four . . . and the reservation boundary lines as established by the survey approved in eighteen hundred and eighty-eight. . . .
>
> ARTICLE II. In consideration of the land ceded, relinquished, and conveyed by Article I of this agreement and in full [*sic*] of all claims and demands of said Klamath and other Indians arising or growing out of the erroneous survey of the outboundaries of their reservation . . . the United States stipulates and

[7] Article IV not only restricted the exclusive right of taking fish to "streams and lakes included in said reservation," it also restricted gathering rights to any area "within [the reservation's] limits." It is apparent that Congress' intent as to fishing and gathering was the same — it should be exercised only within reservation boundaries.



> agrees to pay to and expend for said Indians . . . the sum of five hundred and thirty-seven thousand and seven dollars and twenty cents. . . .

34 Stat. 366, (P.C., App. 25-26).

Just as the foregoing language was "precisely suited" to effect a diminishment of the Klamath Indian Reservation, *DeCoteau v. District County Court, supra*; *Rosebud Sioux Tribe v. Kneip, supra*, the terms were "precisely suited" to abrogate any treaty-reserved rights of the Klamath in that portion of the former reservation ceded to the federal government.

Third, to conclude in the present case that diminishment of the reservation did not abrogate treaty rights would have an anomalous result, and one which Congress could not have intended. Article I of the 1864 Treaty provided not only that the Klamath have the exclusive right to take fish within the reservation, but that "no white person shall be permitted to locate or remain upon the reservation . . . and that in case persons other than those specified are found upon the reservation, they shall be immediately expelled therefrom." 16 Stat. 707, (P.C., App 19). In other words, the Treaty also conferred on the Klamath the right to expel white persons from the reservation. Surely, Congress did not intend in the Cession Act that the Klamath should continue to be able to expel white persons from ceded land which was opened for settlement and also placed in national forests and parks. Yet, the Klamath's right to expel white persons was coterminous with their exclusive right to take fish within the reservation. One of Congress' primary means of ensuring the Klamath's exclusive right of taking fish within the reservation was to

keep white persons off the reservation. It necessarily follows that because Congress must have intended in the Cession Act that the Klamath would lose their right to expel white persons from the ceded land, Congress also intended that the Klamath would lose their exclusive right to fish on the ceded land.

The 1906 Cession Act stripped the ceded land of reservation status. Unless Congress manifested its intent somewhere in the Cession Act, its legislative history or the surrounding circumstances to allow the Klamath to continue to exercise their on-reservation treaty rights on the ceded land, this Court should conclude that the 1906 Cession Act extinguished the Klamath's treaty rights to fish, hunt and trap on the ceded land.

### C. Congressional intent to reserve to the Klamath exclusive fishing, hunting and trapping rights on the ceded lands cannot be discerned from the 1906 Act, the legislative history, or the circumstances surrounding its passage.

*1. Terms of the 1906 Cession Act.*

As discussed above, the terms of conveyance in the 1906 Cession Act were "precisely suited" to effect a relinquishment of any exclusive Indian fishing and hunting rights on the ceded lands. The Ninth Circuit, however, mistakenly focused on Article IV of the 1906 Cession Act which provided:

> It is understood that nothing in this agreement shall be construed to deprive the said Klamath and other Indians of the Klamath Agency of any benefits to which they are entitled under existing treaties, not inconsistent with the provisions of this agreement.



34 Stat. 366 (P.C., App 28).

The Ninth Circuit seized upon this language and concluded that the 1906 Cession Act preserved the Klamath's fishing, hunting and trapping rights on the ceded land. But the only rights which the Klamath had "under existing treaties" were the rights secured to them under the 1864 Treaty. As discussed above, these rights were limited to the boundaries of the reservation. Nothing in the 1906 Act deprived the Klamath of rights exercisable within the boundaries of the reservation, as diminished by the 1906 Cession Act.

Article IV assured the Klamath that they would be able to continue to exercise their treaty rights, but only within the limits of the diminished reservation. If the 1864 Treaty had conferred any off-reservation fishing, hunting or trapping rights on the Klamath, then the Cession Act would not have affected those rights. The 1864 Treaty, however, made no mention of the Klamath retaining off-reservation wildlife gathering rights, and hence, the 1906 Act could not preserve such prerogatives.

This Court should not countenance the Ninth Circuit's construction of Article IV of the 1906 Cession Act. Virtually identical terms also appeared in the acts which opened to settlement unallotted lands in the Rosebud Reservation, but the Court declined to read too much into the language. Notwithstanding the provision that "nothing in this agreement shall be construed to deprive the . . . Indians of the Rosebud Reservation, South Dakota, of any benefits to

which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement," *Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 623 (Justice Marshall, dissenting), this Court found that the acts clearly evidenced congressional intent to diminish the boundaries of the Rosebud Sioux Reservation and to subject the Rosebud to South Dakota's jurisdiction. *Rosebud Sioux Tribe v. Kneip*, *supra*.

In any event, Article IV of the 1906 Act only preserved benefits "under existing treaties" which were "not inconsistent with" the 1906 Act. Article IV did not confer any additional rights on the Klamath. To conclude, as the Ninth Circuit did below, that Article IV had the effect of allowing the Klamath exclusively to fish, hunt and trap on the ceded lands would require this Court to construe Article IV as granting or reserving to the Klamath rights which were inconsistent with the plain language and purpose of the 1906 Cession Act.

2. *Legislative history and surrounding circumstances*

Neither the legislative history nor the circumstances surrounding the 1906 Cession Act evidence congressional intent to expand the Klamath's exclusive fishing, hunting and trapping rights beyond reservation boundaries. Such an intent would have been contrary to the then-prevailing national policy.

Both the original Klamath Treaty of October 4, 1864, and the 1906 Cession Act were formulated during the national era of Indian allotments and assimilation. The period was marked by comprehensive legislation authorizing the acquisition of Indian lands and resources, F. Cohen, *Handbook of Federal Indian Law* 128 (1982 ed.), and the policy was evident:



> Proponents of assimilation policies maintained that if Indians adopted the habits of civilized life they would need less land, and the surplus would be available for white settlers.

*Id.*

The primary goals of assimilation during those years were expressed in the General Allotment Act of 1887, commonly referred to as the Dawes Act. 24 Stat. 388, ch. 119.

> The idea was to settle the Indians on homesteads, introduce them to farming, and make them members of the non-Indian society.

Dawes, *Solving the Indian Problem*, Board of Indian Commn'rs Ann. Rep. 69-70 (1883), *reprinted in* Americanizing the American Indians (F. Prucha ed. 1973). The process of "civilization" was thought to be marked and brought about by, "the [Indian's] transition from the nomadic life of the hunter . . . to the settled life of the farmer." F. Prucha, *American Indian Policy in the Formative Years*, 213-14 (1962).

The original treaty of 1864 and the 1906 Cession Act reflect the then contemporary national policy. The primary purpose of the treaty was to advance Indian participation in the industries of civilization, particularly in agriculture. Article 2 of the Treaty stated that "in consideration of, and in payment for the country ceded by this treaty, the United States agree to pay the tribes conveying the same [an amount of money to] be applied to the use and benefit of said Indians by the Superintendent . . . so as to carry out the design of the expenditure, [it] being to promote the well-being

of the Indians, advance them in civilization, and especially agriculture, and to secure their moral improvement and education." 16 Stat. 707. Article 3 advanced sums for subsistence during the first year on the reservation and for the purchase of "teams, farming implements, tools, seeds, clothing, and provisions, and for the payment of the necessary employes." *Id.* Article 4 provided for the erection and tooling of a flouring-mill. Article 5 required the United States to furnish a Superintendent of farming operations as a farmer and a miller for 15 years. Article 6 provided for the allotment of lands. An examination of the terms of the Klamath Treaty shows that it, as the treaty construed in *Winters v. United States*, 207 U.S. 564 (1908), created a reservation for the purpose of changing the Indians' "nomadic and uncivilized" habits making them a "pastoral and civilized people." *Id.* at 576.

The history of the Klamath Treaty confirms what is evident from the language of the document — its purpose was to convert the Indians to agricultural pursuits. On June 22, 1864, Charles Mix, Acting Commissioner of Indian Affairs, sent J.W. Perit Huntington, Superintendent for Indian Affairs in Oregon, a letter authorizing a treaty with the Klamath, Modoc, and Paiute Tribes. The letter stressed the importance of providing for the Indians' agricultural pursuits when negotiating the boundaries of any reservation.[8]

[8] Commissioner Mix detailed the framework for negotiations:

> It is not the policy of the government to admit title in the wandering tribes of Indians upon the Pacific coast; and unless you

*(Footnote continued on next page)*



In December of 1864, Huntington reported to the Office of the Superintendent of Indian Affairs that in successfully negotiating a treaty he had carried out the principal purpose to locate the reservation on a tract which would support "industrial pursuits."[9]

*(Footnote continued from previous page)*

> find insuperable difficulties, I would advise that the treaty should be one of peace and friendship, and an agreement on the part of the Indians to reside upon a proper reservation, to be selected and distinctly marked, with an agreement on the part of the United States to provide them with such necessary supplies, farmers and mechanics, as will enable them to subsist and advance in civilization, so as to be able to take care of themselves. If, however, you find it necessary to negotiate for the exclusive possesion of any part of the country which they occupy, to enable our people to develop its mineral productions or avail of its agricultural resources, care should also be taken in that case that the boundaries of the portion retained by the Indians should be clearly defined, if possible, by natural landmarks, and that within its limits there should be such natural resources as will enable the Indians, with but little assistance from the government, and for a time but little departure from their ordinary pursuits, to obtain a livehood; and which shall also be as far removed as possible from white settlements, and least liable to be intruded upon by white settlers. The territory retained should also be adapted to grazing and agricultural pursuits, so that when in course of time they shall be reclaimed from their present wild and barbarous mode of life, and induced to turn their attention to more civilized pursuits, there will be no necessity for a new treaty and their removal to a new country.

Report of the Commissioner of Indian Affairs for the Year 1864, 112-13 (1864), reprinted in Report . . . 38th Cong., 2d Sess. H. Exec. Doc., v. 5, 256-57 (1864-65).

[9] Local Superintendent Huntington described the 1864 reservation and his objectives in the following terms:

> The country ceded by the treaty of 15th October is of vast extent, as you can see by reference to the map, say 15,000 to 20,000 square miles, and presents great diversity of topography, soil, and climate. Parts of it are barren mountains and sage plains, of no agricultural value, but probably possessing great mineral wealth. Other portions are valuable for grazing purposes, producing a large amount of nutritious grass, but containing little or no

*(Footnote continued on next page)*

Clearly, the primary purpose of the 1864 Treaty was to promote agricultural activities by the Indians. Secondary purposes were to separate the tribe from white settlers[10] and to enable the tribe to acquire the attributes of the settlers' comparative prosperity.[11] The provisions of the treaty allow-

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*(Footnote continued from previous page)*

land fit for cultivation.

. . . .

> The reservation designated by the treaty for the Indians includes, besides much country almost a desert, the Upper Klamath lake or marsh, which affords great supplies of edible roots and seeds for the Indians, and much fine grazing land; and it gives them access to the Middle lake and the Klamath or Williamson river, connecting the two, for fishing purposes. It also takes in enough arable land of good quality near the mouth of Williamson river to support all the Indians which are ever likely to be placed upon it. The more extensive valleys upon the Middle and Lower lakes are not embraced within its limits. *In determining the bounds of the reservation, I sought primarily to secure a tract of country which had local advantages for supporting a colony of Indians by industrial pursuits.* A second object, and one scarcely less important, was to so locate the tribes that their separation from whites would be as nearly complete as possible. This reservation is not likely to be traversed by any important line of travel, and but a small portion of it will be coveted by whites for settlement.

Report of the Comm. of Indian Affairs for the Year 1865, 102 (1865), reprinted in Report . . . 39th Cong., 1st Sess., H. Exec. Doc, Doc. 1, U.S. Serial Set 1248, p 270 (1865). (Emphasis added).

[10] In his summary of the treaty, Huntington did not mention the grant of exclusive rights to fish and gather, but he noted that, "No whites except government officers and employes to be allowed to remain upon the reservation." Report of the Comm. of Indian Affairs for the Year 1865, *supra* n. 8.

[11] A reconstruction of the events leading up to the Treaty from the Indian perspective is contained in Stern, *The Klamath Indians and the Treaty of 1864*, 57 Or. Hist. Quart. 229 (1956). Stern concludes that it is probable that the comparative prosperity of the white settlers was the primary motivation of the Tribe to negotiate the treaty:

> The whites, settler and official, did not seem to see that there was no abstract reason why the Indian should be moved to abandon his own way of life for that of the white. It was well enough for subchief Henry Blow in later years to contrast the orderly life of the

*(Footnote continued on next page)*



ing no whites to remain upon the reservation and confirming exclusive fishing rights in streams and lakes "within the reservation" fostered these secondary purposes as well as the principal goal to motivate Indian agriculture.

By 1901, when the cession agreement was negotiated, the Klamath Tribe members reportedly were well on their way to fulfilling the design of the treaty. In a letter to the Secretary of the Interior dated December 18, 1896, the Klamath Boundary Commissioners said:

> [Klamath Tribe members] have, with rare exceptions, adopted the language, dress, and habits of the Whites, and the children are few who are not inmates of the excellent schools provided by the Government. An eager desire for further and continuous progress seems to animate young and old alike. The admirable provisions of the Government to enable them to acquire land in severalty and to build houses and barns are highly beneficial. One step further would assure their self-support and independence of Government aid.
>
> This step is some assistance to enable them to utilize profitably the lands now being allotted them.
>
> Grazing is the best and largely predominant resource of the reservation, therefore a few head of cattle as a start for each family would seem a prime necessity.

S. Doc. No. 93, 54th Cong., 2d Sess. (Stip., Ex. D).

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*(Footnote continued from previous page)*

reservation with an almost anarchistic past. However great the weight of such sentiments in reservation days, they do not seem to have been prevalent at the time of which we speak. The impression, rather, grows that many Indians saw the comparative prosperity and power of the whites, and sought to acquire the attributes thereof in whatever ways they could.

*Id.* at 255 (footnote omitted).

In a letter to Congress dated March 3, 1900 the tribe wrote:

> On our part we have been true to our treaty stipulations, have made progress in civilization, and are making homes upon our allotted lands. About 250 of our children are being educated in our schools that they may understand their duty as Americans and live as such. We are improving our reservation by building houses and barns, opening irrigation ditches, fencing, and in many ways. This will make us self-supporting and will add to the wealth of the whole country.
>
> We have forever laid aside the wild customs and crude life of our fathers, and look forward to a time when we hope to prove our worth as loyal and law-abiding citizens.

H. Doc. No. 156, 56th Cong., 2d Sess. (Stip., Ex. E).

The documents, antedating the 1906 ratification of the 1901 Cession Agreement, informed Congress that both the Klamath Indians and federal administrative officials believed that the allotment and assimilation policy of the federal government successfully had been implemented. Article III of the 1906 Cession Act required that the money received by the Indians for their ceded lands be used to fund drainage and irrigation projects and to purchase cattle. Neither the prior history of the cession agreement nor the agreement itself contains any mention of fishing and hunting rights because reservation of those rights on the ceded lands would have been completely contrary to the agricultural goal of the 1864 treaty and the reported, mutually desirable agrarian progress made by the Klamaths after 1864.

The Ninth Circuit, however, took the Cession Act's lack of a reference to fishing and hunting rights out of the Act's historical context. It erroneously reasoned that because the



cession agreement did not mention fishing, hunting and trapping rights, the Klamath were not compensated for these rights, and therefore Congress must not have intended to abrogate those rights. The *ratio decidendi* in the analysis was the fact that "only a small part of the ceded lands was usable for agricultural purposes, and was far better suited for hunting, fishing, and trapping." *Klamath Indian Tribe v. The Oregon Department of Fish and Wildlife*, 729 F.2d at 613.

This reasoning is fallacious. If the real value of the ceded land were for fishing, hunting and trapping, one wonders what the Klamath thought they were being compensated for, and what Congress thought it was paying the Klamath for, if not the wildlife resource value of the land. The court's reasoning makes it appear that Congress, in 1906, paid the Klamaths 87 cents an acre for land that had value only for fishing, hunting and trapping, and yet paid no compensation for loss of wildlife gathering rights. Under the Ninth Circuit misanalysis, Congress paid 87 cents per acre — over one-half million dollars total — for essentially nothing.

The lower court's reasoning should be rejected. In any event, because this is a diminishment case the inquiry is not whether Congress, in determining the compensation to be paid the Klamath, evidenced its intent to take away the Tribe's fishing, hunting and trapping rights. The inquiry is whether the compensation paid the tribe evidences clear congressional intent that the Klamath were to be granted back those rights. At best, the compensation issue raises an ambiguity as to what Congress intended, and does not estab-

lish congressional intent to restore exclusive fishing, hunting and trapping rights on the ceded lands.

*3. Subsequent construction*

In the present case, the scant facts concerning the parties' subsequent construction of the cession agreement ratified by the 1906 Act are in equipoise. The parties stipulated to the following facts:

> Members of the Tribe have continued to hunt, fish and trap on the excluded lands from the time of their cession to the present without regard for state laws or regulations.
>
> Before and after the 1906 cession, the State of Oregon generally asserted jurisdiction over hunting, fishing and trapping by Indians of the Klamath Reservation when outside the boundaries of the Reservation. The Department of the Interior and the BIA acknowledged State jurisdiction outside the reservation boundaries. (Exhibits J&L).
>
> The parties to this action are unaware of any assertion by the State or denial by the Tribe of state jurisdiction over Indian hunting and fishing with specific regard to the lands of the 1901 Cession Agreement.

(J.A. 14-15).

These facts shed little light on the question whether the 1901 Cession Agreement was intended or understood to grant the Klamath exclusive rights to fish, hunt and trap on the ceded lands. Resolution of the issue therefore turns on the review of the terms of the cession agreement, its legislative history, and the circumstances surrounding the execution of the agreement. As discussed above, clear congressional intent to restore to the the Klamath exclusive fishing, hunting and



trapping rights does not appear from the Cession Act, the legislative history or surrounding circumstances. Congress manifested its intent on the face of the 1906 Cession Act that the Klamath relinquish these rights in the ceded land. In holding otherwise, the Ninth Circuit rewrote the terms of the Cession Act to remedy a perceived injustice to the Klamath. The Ninth Circuit, thus, contravened this Court's counsel in *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943):

> Of course treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." *But even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.*[12]

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[12] There is no basis for concluding that the Klamath were not informed about the effect of the cession agreement or that they did not have the opportunity to inquire as to its effect on their fishing, hunting and trapping rights if they had any questions. First, the Klamath were represented by counsel during this period (*see, e.g.* letter from attorneys McCammon and Belt to Commissioner of Indian Affairs, dated April 10, 1899. Stip. Ex. E). Indeed, Congress provided in Article III of the 1906 Act for payment of the Klamath's legal expenses. Second, the members of the Klamath and other tribes with whom Inspector McLaughlin negotiated

> were all intelligent Indians and representative men of the tribes, who understood and spoke English, so that an intepreter was

*(Footnote continued on next page)*

(Emphasis added).

## CONCLUSION

The court below misanalyzed this case. It totally ignored the fundamental principle of Indian treaty law that when Congress diminishes reservation boundaries, treaty rights exclusively to fish, hunt and trap on lands within the reservation are abrogated as to the land removed from the reservation. Those rights continue to exist on such land only if Congress clearly manifests an intent to restore those rights on the removed lands. Application of this rule to the facts of this case compels the conclusion that the Klamath relinquished their exclusive fishing, hunting and trapping rights on lands which they voluntarily ceded to the United States.

For these reasons, this Court should hold that the state properly may regulate the Klamath's fishing, hunting and trapping on 621,000 acres formerly within the boundaries of

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*(Footnote continued from previous page)*

> unnecessary in our negotiations except at the first council, when about 150 Indians were present among whom were some very old men who did not understand English very well.

Letter dated October 29, 1900, from McLaughlin to Secretary of the Interior. (Stip. Ex. E). McLaughlin informed the Indians "that all their right, title, and interest to lands outside of the boundary commission line was ceded to the government by this treaty of October 14, 1864." *Id.* At the conclusion of the negotiations, McLaughlin "read the agreement to them, and had it interpreted paragraph by paragraph," after which all 128 Indians present "immediately signed their names." *Id.*



the Klamath Indian Reservation. The Court should reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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